Kinabalu International Hotel Sdn Bhd (Hyatt Regency Kinabalu) v The Honourable Minister of Human Resources, Malaysia & Anor

HIGH COURT (KOTA KINABALU) — NO JRK25–33 OF 2010
DAVID WONG J
24 AUGUST 2011

Labour Law — Industrial dispute — Recognition of trade union — Reference to Industrial Court for adjudication — Whether union had majority vote — Dispute as to whether employees who were members of Royal Malaysia Police Force were entitled to vote — Union only having 49.779% support — Recognition not accorded — Trade Unions Regulations 1959 reg 65(2) — Industrial Relations Act 1967 s 9(1)

Labour Law — Trade union — Recognition — Whether union had majority vote — Dispute as to whether employees who were members of Royal Malaysia Police Force were entitled to vote — Union only having 49.779% support — Recognition not accorded — Trade Unions Regulations 1959 reg 65(2) — Industrial Relations Act 1967 s 9(1)

Police — Personnel — Whether members of Royal Malaysia Police Force — Whether members of Police Reserve Unit are members of Royal Malaysia Police Force — Police Act 1967 ss 38, 41, 42 & 46(1)

The second respondent's several attempts to seek recognition with the applicant were rejected on the ground that the second respondent did not have the majority vote that they claimed they had. Subsequently, the applicant was asked by the Industrial Relations Office to hold a secret ballot to determine the percentage of membership of the second respondent. The secret ballot exercise was conducted on the 230 employees. The outcome of the ballot showed that the second respondent had 50.43% support. Based on that vote, the first respondent exercising his power under s 9(5) of the Industrial Relations Act 1967 ('IRA') gave recognition to the second respondent. The applicant thus filed this application to set aside or quash the decision of the first respondent. The applicant claimed that three employees of the applicant were not eligible to vote as they were member of the Royal Malaysia Police Force ('RMPF'). If their votes were not counted, the second respondent would only have 49.779% support which would bar the first respondent from giving recognition.

Held:

(1) Based on the provisions of ss 38, 41, 42 and 46(1) of the Police Act 1967,

members of the Police Reserve Unit are members of the RMPF. As members of the Police Reserve Unit are governed by the provisions of the Police Act, they must be deemed to be members of the RMPF (see para 16).

(2) The percentage of membership of the second respondent as determined by the secret ballot was erroneous by virtue of the fact that the three employees who had participated in the secret ballot exercise were members of the Police Reserve Unit and were not eligible to be members of the second respondent and to vote in the secret ballot under s 92 of the Police Act 1967 and s 27(2) of the Trade Unions Act 1959 (see para 21(d).

(3) The total percentage of members of the second respondent employed with the applicant did not reach a majority as envisaged by formula provided for in reg 65(2) of the Trade Unions Regulations 1959 read with s 9(1) of the Industrial Relations Act 1967 and thus the applicant need not accord any recognition to the second respondent (see para 21(e).

[Bahasa Malaysia summary

Percubaan beberapa kali responden kedua untuk mendapatkan pengiktirafan terhadap pemohon telah ditolak atas alasan bahawa responden kedua tidak mempunyai undi majoriti seperti yang didakwa. Kemudian, pemohon telah diminta oleh Pejabat Perhubungan Perusahaan untuk mengadakan undi sulit bagi menentukan peratusan keahlian responden kedua. Undi rahsia tersebut yang diadakan ke atas 230 pekerja. Hasil undian menunjukkan bahawa responden kedua mendapat 50.43% sokongan. Berdasarkan undi tersebut, responden pertama dalam menjalankan kuasanya di bawah s 9(5) Akta Perhubungan Perusahaan 1967 ('APP') memberi pengiktirafan kepada responden kedua. Oleh itu, pemohon memfailkan permohonan ini untuk mengenepikan atau membatalkan keputusan responden pertama. Pemohon mendakwa bahawa tiga orang daripada pekerja pemohon tidak berlayakan mengundi kerana mereka adalah anggota Pasukan Polis Diraja Malaysia ('PDRM'). Jika undi mereka tidak dikira, responden kedua hanya akan mendapat sokongan 49.779% yang akan menghalang responden pertama daripada memberi pengiktirafan.

Diputuskan:

(1) Berdasarkan peruntukan ss 38, 41, 42 dan 46(1) Akta Polis 1967, anggota Unit Simpanan Polis adalah ahli PDRM. Oleh kerana anggota-anggota Unit Simpanan Polis dikawal oleh peruntukan-peruntukan Akta Polis, mereka hendaklah disifatkan sebagai ahli PDRM (lihat perenggan 16).

(2) Peratusan keahlian responden kedua sebagaimana yang ditentukan oleh undi rahsia adalah salah berdasarkan fakta bahawa tiga pekerja yang telah

mengambil bahagian dalam menjalankan undi rahsia tersebut adalah anggota Unit Simpanan Polis dan tidak berkelayakan untuk menjadi ahli-ahli responden kedua dan mengundi dalam undi rahsia di bawah s 92 Akta Polis 1967 dan s 27(2) daripada Akta Kesatuan Sekerja 1959 (lihat perenggan 12(d)).

(3) Jumlah peratusan ahli-ahli responden kedua yang bekerja dengan pemohon tidak mencapai majoriti seperti yang dibayangkan oleh formula yang diperuntukkan dalam peraturan 65(2) Peraturan-Peraturan Kesatuan Sekerja 1959 dibaca bersama-sama dengan s 9(1) Akta Perhubungan Perusahaan 1967 dan oleh itu pemohon tidak perlu memberi sebarang pengiktirafan kepada responden kedua (lihat perenggan 12(e)).]

Notes

For cases on industrial dispute, see 8(2) *Mallal's Digest* (4th ed, 2011 Reissue) paras 1800–1801.

For cases on trade union, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1961–1943.

For cases on police in general, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1275–1400.

Legislation referred to

Industrial Relations Act 1967 s 9(1), (5)
Police Act 1967 ss 2, 38, 39, 41, 42, 42(2), 46(1), 92
Trade Unions Act 1959 s 27(2)
Trade Unions Regulations 1959 reg 65(2)

Thomas Ting (Ng & Ting Kota) for the applicant.
Steve Ritikos (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
The second respondent unrepresented.

David Wong J:

PROCEEDING

[1] The applicant comes to court to set aside the decisions of the first respondent dated 18 March 2010 and 3 May 2010 on the ground that the first respondent's decisions are premised on errors of law and fact. The decision of the first respondent concerns his recognition of the second respondent as a trade union under s 9(5) of the IRA 1967.

BACKGROUND FACTS

[2] Prior to 25 May 2009, the second respondent had made several attempts

to seek recognition with the applicant. On 25 May 2009, the second respondent made the third attempt for recognition but again was rejected on the ground that as the applicant believed that they did not have the majority vote that they claimed they had. On 10 August 2009, the applicant then received a letter from the Jabatan Hal Ehwal Kesatuan Sekerja Sabah informing that one of its officers would visit the applicant's premises on 25 August 2009 to ascertain the issue of the eligibility of representation of the employees of the applicant by the second respondent.

[3] The applicant was also informed by an industrial relations officer from the JPP, Putrajaya on 3 November 2009 that they are aware of the second respondent's claim of recognition dated 25 May 2009 and was also requested to carry out a membership verification and that the applicant was required to submit details of their employees employed as at 25 May 2009 (ie date of claim of recognition).

[4] Such request was acceded to with the applicant submitting their list of employees as at 25 May 2009 totaling 231 employees.

[5] The applicant then received a letter from JPP, Putrajaya to inform the applicant that a secret ballot would be carried out to determine the percentage of membership of the second respondent. The secret ballot exercise was then conducted on the 22 February 2010 with the number of employee reduced to 230 due to the death of one employee. The ballot session was observed by two representatives from the second respondent and two representatives from the applicant.

[6] The outcome of the ballot was as follows:

Number of employees eligible to vote for the second respondent:	230 employees
Total employees who came to vote for the second respondent:	123 employees
Total voted: 'Ahli Kesatuan':	116 employees
Total voted: 'Bukan Ahli Kesatuan':	5 employees
Total 'Undi Rosak':	2 employees
Total percentage of votes for the second respondent:	50.43% (116/230x100%)

[7] Based on that vote, the first respondent exercising his power under s 9(5) of the Industrial Relation Act 1967 ('IRA') gave recognition to the second respondent which gives rise to this application by the applicant to set aside or

quash the decision of the first respondent.

THE APPLICANT'S CASE

[8] The applicant's grounds can be summarised as this:

(a) three employees of the applicant are not eligible to vote as they were member of the Royal Malaysia Police Force; and

(b) that the employees of the applicant were coerced to vote for the second respondent by illegal methods.

GROUND 1

Three employees of the applicant are not eligible to vote as they were member of the Royal Malaysia Police Force

[9] The three employees of the applicant who had participated in the secret ballot are Crispine Benjamin Stomin, AL Josep @ Henry bin Malibin and James Malim, are members of the Police Reserve Unit ('Sukarelawan Polis DiRaja Malaysia'). By virtue of this, counsel for the applicant submits that they are members of the Royal Malaysia Police Force and as such prohibited by law from engaging in union activity. If their votes are not counted, the second respondent would only have 49.779% (113/227 x 100%) support which bars the first respondent from giving recognition.

[10] The relevant provision in the Trade Unions Act ('TUA') that prohibits members of the Royal Malaysia Police Force is s 27(2) of the TUA 1959 which states as follows:

27 Membership of public officers and employees of statutory authorities

(1) Subject to subsection (2), no public officer shall join or be a member of any trade union or shall be accepted as a member of any trade union.

(2) The Yang di-Pertuan Agong may by notification in the Gazette exempt from the provisions of subsection (1), either wholly or subject to such conditions as may be specified in such notification, any public officers or any category, class or description of public officers other than —

(a) members of the Royal Malaysian Police

[11] Another provision that provides a similar position of law is s 92 of the Police Act 1967 which reads as follows:

92 Police officer not to be member of Trade Union

(1) Notwithstanding anything contained in any other law, any police officer who,

A subject to this Act, becomes or after the expiration of one month from the coming into force of this Act remains a member of any trade union, or of any association with political objects, or any political party shall be guilty of an offence under this Act.

(2) For the purpose of this section any question whether any body is a trade union or association to which this section applies shall be determined by the Minister.

(3) In this section the expression 'police officer' includes an extra police officer and any member of the police force of another territory present in Malaysia under this Act.

[12] The issue which confronts me is whether members of the Police Reserve Unit are members of the Royal Malaysia Police Force. In order to answer this issue, reference must be made to a few provisions in the Police Act 1967. Section 46(1) provides:

46 Reinstatement in civilian employment

(1) It shall be the duty of the employer by whom any volunteer reserve police officer was employed for a period of at least three months immediately preceding the day on which such officer was mobilised under this Part to re- employ him on the completion of active service pursuant to such mobilisation including any leave earned by such service in an occupation and under conditions not less favourable than those which would have been applicable to him had he not been mobilised.

[13] What s 46(1) entails is that when a person is called to perform the duties of a volunteer reserve police officer, he will be deemed to no longer be in his civilian employment. The provision of s 46 requires the said person to be reinstated in his civilian employment after completing active duty with the Police Reserve Unit.

[14] The next section for reference is s 42 of the Police Act. Section 42(2) provides:

42 Pay and allowances

(2) When mobilised, a volunteer reserve police officer shall receive such pay and allowances as may be prescribed for a police officer of corresponding rank and seniority in such rank.

[15] Sections 38 and 41 of the Police Act provide for circumstances in which a member of the Police Reserve Unit may resign or be required to resign. It is undisputed that the Police Reserve Unit derives its existence from the Police Act.

[16] Based on the provisions of the above mentioned sections, I am of the

view that members of the Police Reserve Unit are indeed members of the Royal Malaysia Police Force. Under s 46, Parliament made a clear distinction between civilian employment and employment under the Police Reserve Unit. To my mind, as members of the Police Reserve Unit are governed by the provisions of the Police Act, there must be deemed to be members of the Royal Malaysia Police Force. This is further evidenced by the fact that the pay and allowances of a member of the Police Reserve Unit are paid in accordance with the pay of a police officer of corresponding rank and seniority.

[17] Furthermore, s 39 provides that before assuming office as a volunteer reserve police officer, every member must take an oath as provided for under the Second Schedule of the Police Act. The oath states:

SECOND SCHEDULE

(Section 13, 39 and 48)

DECLARATION OF OFFICE

I, (name), do solemnly sincerely and truly declare that I will well and faithfully serve as … (appointment) of the Royal Malaysia Police and will obey, uphold and maintain the laws of Malaysia, and that I will execute the powers and duties of my office honestly and diligently.

Declared at … this … day of … 19 …

…

Signature

Before me,

…

[18] As provided in the compulsory oath, every member of the Police Reserve Unit must declare that they will faithfully serve as a member of the Royal Malaysia Police. Over and above that, s 2 of the Police Act defines a 'police officer' as 'any member of the Royal Malaysia Police'. It is my considered view that the use of the word 'any' clearly shows that the Police Reserve Unit is deemed as part of the Royal Malaysia Police. To this effect, as illustrated above, numerous provisions have been included in the Police Act and indeed an entire Part, namely Part VIII has been dedicated to them.

[19] Therefore, in my view, based on the provisions, protection, and recognition conferred by the Police Act to members of the Police Reserve Unit, the members of the Police Reserve Unit are members of the Malaysian Royal Police.

GROUND 2

That the employees of the applicant were coerced to vote for the second respondent by illegal methods

[20] In view of my conclusion to ground 1, there is no necessity to deal with this ground. Be that as it may let me say this. The second respondent have, for reasons best known to them, not taken part in this proceeding. The allegations made by the applicant can only be rebutted by the second respondent and it is trite law that allegations made and not unrebutted will be taken by the court as proven.

CONCLUSION

[21] For reasons stated above I make the following:

(a) an order of certiorari to remove into this honourable court for the purposes of quashing the decision of the first respondent dated 18 March 2010 (made under s 9(5) of the Industrial Relations Act 1967) ordering the applicant to accord recognition to the second respondent as trade union;

(b) an order of certiorari to remove into this honourable court for the purposes of quashing the second decision of the first respondent to uphold his initial decision of 18 March 2010 (made under s 9(5) of the Industrial Relations Act 1967) ordering the applicant to accord recognition to the second respondent as a trade union and communicated to the applicant on 19 May 2010 by way of the Director General of Industrial Relations's letter dated 3 May 2010;

(c) a declaration that three of the employees of the applicant, namely Crispine Benjamin Stomin, Al Joseph @ Henry bin Malibin and James Malim, who had participated in the secret ballot exercise of 2 February 2010, were in fact ineligible to be members of the second respondent and to vote in the secret ballot exercise of 22 February 2010 by virtue of s 92 of the Police Act 1967 and s 27(2) of the Trade Unions Act 1959 and the fact that the said three employees were members of the Police Reserve Unit;

(d) a declaration that the percentage of membership of the second respondent as determined by the secret ballot of 22 February 2010 is erroneous and not reflective of the second respondent's representation the applicant by virtue of the fact that three of the employees of the applicant, namely Crispine Benjamin Stomin, Al Josep @ Henry bin Malibin and James Malim, who had participated in the secret ballot exercise of 22

February 2010 and were members of the Police Reserve Unit were not eligible to be members of the second respondent and to vote in the secret ballot of 22 February 2010 under s 92 of the Police Act 1967 and s 27(2) of the Trade Unions Act 1959;

(e) a declaration that the total percentage of members of the second respondent employed with the applicant does not reach a majority as envisaged by formula provided for in reg 65(2) of the Trade Unions Regulations 1959 read with s 9(1) of the Industrial Relations Act 1967 and thus the applicant need not accord any recognition to the second respondent;

(f) an order of mandamus against the first respondent and that he be directed to revoke his order dated 18 March 2010 that the applicant accord recognition to the second respondent; and

(g) an order of mandamus against the first respondent and that he be directed to revoke his second decision to uphold his initial decision of 18 March 2010 (made under s 9(5) of the Industrial Relations Act 1967) ordering the applicant to accord recognition to the second respondent as a trade union and communicated to the applicant on 19 May 2010 by way of the Director General of Industrial Relations' letter dated 3 May 2010.

[22] Order accordingly.

Order accordingly.

Reported by Kanesh Sundrum